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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 477

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS OF AMERICA, INC., AFL-CIO AND INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS—GREAT LAKES DISTRICT LOCAL NO. 47,

Petitioners,

vs,

ROSS M. MADDEN, REGIONAL DIRECTOR OF THIRTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioners,

vs.

ROSS M. MADDEN, REGIONAL DIRECTOR OF THIRTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

International Organization of Masters, Mates and Pilots of America, Inc., AFL-CIO, and International Organization of Masters, Mates and Pilots—Great Lakes District Local No. 47, petitioners herein, pray that a writ of certiorari issue to review a judgment entered by the United States Court of Appeals for the Seventh Circuit on September 26, 1958, affirming issuance by a district court of an injunction against petitioners.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court is printed in Appendix B, hereto, pp. 36-39. The opinion of the Court of Appeals is printed in Appendix C, pp. 40-43. Neither opinion is as yet officially reported.

JURISDICTION.

Although the injunction at issue is in form temporary, an order granting or denying such an injunction is the final judgment which a district court is authorized to enter in this class of case. This Court has jurisdiction under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Whether, where jurisdiction over a defendant in a Section 10(l) proceeding is predicated on the ground that the defendant is a "labor organization" within the meaning of the National Labor Relations Act, it is a jurisdictional prerequisite to issuance of an injunction that the record show and the district court find that the defendant is such a "labor organization" and that it either (a) maintains its principal office in the judicial district involved; or (b) represents therein members who are "employees" within the meaning of the Act.

2. Whether Great Lakes pilots employed by foreign shipowners on foreign vessels are "employees" as defined in the Act.

3. Whether the court below erred in holding that a district court may not decide questions of "statutory jurisdiction" for the purpose of determining whether a temporary injunction should issue under Section 10(l), but may grant such an injunction if it finds merely that the Board, upon a record to be made in a separate and independent

proceeding under Section 10(b), in which the only question will be whether a permanent injunction should be granted, may conclude that the Board has jurisdiction.

4. Whether there is "reasonable cause to believe" that either petitioner herein, in the context of this case, is a "labor organization" as defined in the Act.

STATUTE INVOLVED.

This case arises under Section 10(l) of the National Labor Relations Act (61 Stat. 136, 29 U. S. C. § 160(l)). Insofar as here relevant, that Section vests jurisdiction in federal district courts to grant a temporary injunction against a "labor organization" charged with violating Section 8(b)(4)(A) (29 U. S. C. § 158 (b)(4)(A)), of the Act. The second proviso to Section 10(l) specifically states that "for the purposes of this subsection, district courts shall be deemed to have jurisdiction of a labor organization": (1) "in the district in which *such organization* maintains its principal office," or (2) "in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of *employee* members." (Italics added.) A virtually identical provision (Section 301(c), 61 Stat. 156, 29 U. S. C. § 185(c)), governs the jurisdiction of federal district courts in actions and proceedings "by and against labor organizations" under Sections 301-303 of the Labor Management Relations Act. 61 Stat. 156-158, 29 U. S. C. §§ 185-187.

Section 8(b)(4)(A), insofar as here pertinent[1] declares

1. The Section also makes it unlawful for an "agent" of a labor organization to engage in the specified conduct, but that aspect is irrelevant here, for neither respondent was charged with having acted as an "agent" of a labor organization. For the same reason it is irrelevant that under Section 10(l) a federal court may acquire jurisdiction of a person charged with having violated Section 8(b) (4) (A) in the capacity of agent in the district where the unfair labor practice is alleged to have occurred or "where such person resides or transacts business".

it to be an unfair labor practice for a "labor organization" to engage in specified prohibited conduct. For engaging in the same conduct a "labor organization" may be held liable in damages under Section 303 of the Labor Management Relations Act. "Labor organization" is defined as an organization "in which *employees* participate." Section 2(5). The term "employee" is defined in Section 2(3) to exclude any individual employed "by any * * * person who is not an employer as herein defined" and "any individual employed as a supervisor". The term "supervisor" is defined in Section 2(11) as comprehending any individual "having authority, in the interest of the employer" *inter alia*, to "transfer" employees or "responsibly to direct them" or "effectively to recommend such action". All of these definitions are expressly declared to be applicable to all provisions of the Labor-Management Relations Act, and to have the "same meaning" when used in Title III as when used in Title I. Section 501(3), 61 Stat. 161, 29 U. S. C. § 142.

Procedurally, Section 10(l) provides that when a charge alleging violation of Section 8(b)(4)(A) is filed with the NLRB, the regional officer or attorney to whom it is referred shall make a preliminary investigation forthwith, giving such cases priority over all others. If, after investigation, the officer or attorney has "reasonable cause to believe such charge is true and that a complaint should issue," he "shall" file a petition for "appropriate injunctive relief pending the final adjudication of the Board [pursuant to Section 10(b) and (c)] with respect to such matter." Once a petition is filed, the district court "shall cause notice thereof to be served" upon the parties involved, and they "shall be given an opportunity to appear by counsel and present any relevant testimony". The district court is empowered to grant "such injunctive relief or temporary restraining order as it deems just and

proper, notwithstanding any other provision of law". But no temporary restraining order may be issued without notice in the absence of an allegation of substantial and irreparable injury to the charging party. Any such restraining order "shall be effective for no longer than five days and will become void at the expiration of such period".

The pertinent statutory provisions are set forth in full in Appendix A, pp. 31-35.

STATEMENT.

A. The Pleadings and Affidavits Upon Which Jurisdiction to Enter the Injunction Was Predicated.

On May 1, 1958, respondent herein filed in the United States District Court for the Northern District of Illinois a petition for injunction and an application for temporary restraining order against petitioners herein, invoking Section 10(l). The petition alleged (App. 3), that petitioners herein, "unincorporated associations, are labor organizations within the meaning of Sections 2(5), 8(b) and 10(l) of the Act, and at all times material herein have been engaged within this judicial district in transacting business and in promoting and protecting the interests of their members • • •". The petition did not allege that either of the petitioners herein had any "employee" members. Nor did it allege that either maintained its "principal office" in the Northern District of Illinois.

The only persons whose interests petitioners herein were alleged to be protecting and promoting in the Northern District of Illinois were persons seeking to serve foreign shipowners as pilots of foreign vessels on the Great Lakes. The petition stated (App. 5): "At all times • • • MMP and District MMP have been engaged in a dispute with the owners of foreign ships covering the utilization of American and/or Canadian sailing masters when navigat-

ing in the Great Lakes, and in connection therewith, [they] have engaged in a strike against the foreign shipowners". Pursuant to that dispute with the foreign shipowners, petitioners herein were alleged to have picketed at "docks, piers and other waterfront terminals on the Great Lakes" (*Ibid*). The petition sought to enjoin all such picketing (App. 8). On May 2, 1958, the district court entered an *ex parte* temporary restraining order in the terms prayed for.

In accordance with Rule 12(b) of the Federal Rules of Civil Procedure, petitioners herein thereupon filed separate motions to dismiss the petition on the ground that neither is a "labor organization" within the meaning of the Act (App. 9-10). The President of petitioner Local 47, Johnson, filed a supporting affidavit, declaring that the Local is an organization independent of and separate from the International with which it is affiliated; that it is composed exclusively of masters, mates and pilots who are licensed for Great Lakes navigation and that only such licensed deck officers are admissible to membership (App. 10-11). The affidavit states that masters and mates who are members of Local 47 are empowered to hire and discharge crew members and responsibly direct their work and that pilots, "from the time they come aboard ship and take over from the Captain, assume entire command" of the navigation of the vessel and issue orders "to the Captain, the mates, the helmsmen and to members of the crew" which the latter "are required to obey".

Respondent herein filed counter-affidavits which dealt only with the duties, powers and status of pilots while serving aboard foreign vessels owned by foreign shipowners on the Great Lakes (App. 17-23). The statements contained in these affidavits constitute the only evidence offered by respondent in the district court to establish that either petitioner herein has any "employee" members, that either

represents any "employee" members in the Northern District of Illinois and that either is a "labor organization" as defined in the Act. In reply, petitioners herein submitted counter-affidavits (App. 25-30) dealing in detail with the duties, powers and status of pilots while serving aboard foreign vessels on the Great Lakes. Petitioner Local 47 also submitted a supplemental affidavit (App. 24) in which Johnson stated that Regional Director Madden had advised him that although Local 47 represented all of the licensed pilots available for hire by foreign shipowners on the Great Lakes, the Board was not empowered to conduct an election among the pilots or require the foreign shipowners to bargain with Local 47 on their behalf.

B. The Issue as Framed by Respondent Herein in the Courts Below.

Consistent with the narrow focus of its affidavits, and in accord with the uniform holdings of the Board [2] and of the courts [3] and the statutes of the United States under which they are "officers" vested with power of command,[4] respondent herein conceded both in the district court (Br.

2. *Dravo Corp.*, 39 NLRB 846, 851; *Ohio Barge Line, Inc.*, 59 NLRB 154, 156; *Wyandotte Transportation Company*, 62 NLRB 1518, 1520-1521; *Wilson Transit Co.*, 80 NLRB 1476, 1479-1480; *Colle Towing Company, Inc.*, 85 NLRB 899.

3. *A. H. Bull Steamship Co.* v. *National Marine Engineers Beneficial Association, AFL-CIO and International Organization of Masters, Mates and Pilots, Inc., AFL-CIO*, 250 F. 2d 332, 335, 336, 338, cert. denied, 355 U. S. 932; *NLRB* v. *Wyandotte Transportation Co.*, 162 F. 2d 101, 102-103 (C. A. 6); set aside after passage of the Taft-Hartley Act, 166 F. 2d 434 (C. A. 6); *Jones and Laughlin Steel Corp.* v. *N. L. R. B.*, 146 F. 2d 833, 834 (C. A. 5), cert. denied, 325 U. S. 886; *N. L. R. B.* v. *Delaware-New Jersey Ferry Co.*, 128 F. 2d 130, 135-137 (C. A. 3); *Madden* v. *Local 28, International Organization of Masters, Mates and Pilots* (N. D., Ill., per Perry, J.), decided October 7, 1958, 42 LRRM 2793.

4. 46 U. S. C. Sec. 224, 701 (Fourth, Fifth and Sixth); 18 U. S. C. Sec. 2193.

p. 3)[5] and in the court below (Br. p. 25 and note 17, p. 38, n. 26), that, on American vessels, Great Lakes masters, mates and pilots are employed in the capacity of "supervisor" within the meaning of the Act. Consequently unless pilots, when in the employ of foreign shipowners, are "employees" within the meaning of the Act, petitioners on this record have no "employee" members and are therefore not "labor organizations" within the meaning of the Act. Accordingly, as the district court stated in its opinion (App. 32): "here, the crucial issue is the status of pilots of foreign ships on the Great Lakes."

C. The District Court Holds That Pilots On Foreign Vessels Are "Employees" Rather Than "Supervisors" and that There Is Therefore "Reasonable Cause to Believe" that Petitioner Local 47 and Petitioner MMP Is Each a "Labor Organization" Within the Meaning of the Act.

The district court resolved the question whether pilots of foreign vessels are "employees" or "supervisors" under the Act on the basis of the conflicting affidavits alone. Asserting that the affidavits "do not differ materially," and purporting to accept those proffered by petitioners herein, it found (App. 32) that "the duties of pilots in some ways fit" the definition of "supervisor" in Section 2(11):

> after a pilot boards a ship he gives directions as to the course it is to steer. To accomplish this he some-

5. In its brief to the district court, respondent herein stated the issue as follows:

> In resolving the question of whether District MMP is a labor organization, it is immaterial that pilots on American vessels or that pilots on vessels voyaging in areas other than the Great Lakes, perform duties of a supervisory nature. The sole issue is whether respondent MMP's pilot members are "supervisors" or "employees" when employed by foreign shipowners on the Great Lakes.

times gives commands directly to the helmsman; and if the helmsman is inefficient the pilot recommends to the captain that he be relieved and another seaman substituted. This advice is almost always instantly followed. The affidavits emphasize that the captains often have the pilots "take over" the ship. There is no doubt that they give orders and that these orders are obeyed.

However, on the basis of assertions contained in the affidavits submitted by respondent herein, the court concluded (App. 33), that pilots "are employed by the foreign shipowners to give necessary technical advice and assistance. They act aboard ship in this capacity, not as 'supervisors' within the meaning of the Act." (*Ibid.*)

The district court, as did respondent herein, overlooked entirely the applicability of the law of pilots in determining in this case their status, powers, authority and responsibility. Under Anglo-American law, the pilot who comes aboard a vessel to direct her navigation is temporary master. While on duty, he is in complete command of the ship, and of the officers and crew, in all matters affecting navigation. *McLachlan's Law of Merchant Shipping* (Sixth Ed., 1923), p. 210; *Cooley* v. *Board of Wardens*, 12 How. (U. S.) 299, 316; *Ralli* v. *Troop*, 157 U. S. 386, 402; *The Oregon*, 158 U. S. 186, 194, 195; 3 Kent, *Commentaries* (12th Ed.), p. 176; *United States* v. *Forbes*, 25 Fed. Cases, No. 15, 129, pp. 1141, 1142 (E. D. Pa., 1845). The status of "advisor of the master" is accorded to pilots only under certain systems of foreign law, applicable in foreign waters, not in the Great Lakes. *McLachlan's Law of Merchant Shipping* (Sixth Ed., 1923), p. 210, note 4; 48 Am. Jur. § 193, p. 133.

Petitioners herein electing to stand on their motions to dismiss (App. 34-35), the district court, on June 17, 1958, issued the temporary injunction as prayed (App. 36, 37-38). On the same day petitioners appealed to the court below

(App. 39) and filed in the court below an emergency motion to expedite the appeal (R. .....). On June 18, said motion was denied by Judge Finnegan (R. .....). Petitioners filed their printed appendix and brief within thirty (30) days, and moved to advance the cause on the argument calendar. The cause was argued below on September 8, 1958.

D. Respondent Herein Concedes in the Court Below that the Act Has No Application to Employment of Petitioners' Pilot Members by Foreign Shipowners.

In its brief to the court below (p. 24), served in typewritten form on August 22, respondent herein for the first time conceded that the Board would be "unable to conduct an election and require the foreign shipowners herein to bargain with Local 47" on behalf of the pilots. It asserted that this preclusion stemmed not from the status of the pilots as supervisors but rather "from the Board's lack of jurisdiction over the foreign ships." (*ibid.*)

In their reply brief to the court below (pp. 1-2), and in oral argument, petitioners herein pointed out that since respondent's allegation that petitioners are labor organizations rests entirely in this case upon respondent's claim that when serving foreign shipowners aboard foreign vessels members of Local 47 are "employees" within the meaning of the Act, this concession is fatal. Petitioners stated (Reply Brief, p. 2): "Foreign owners of foreign vessels are not 'employers' within the meaning of the Act. *Foley Bros.* v. *Filardo*, 336 U. S. 281, 286 (holding the Eight Hour law inapplicable to employment of American citizens by foreign employers); *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138, 142-144 and note 5 (recognizing that the Taft-Hartley Act is inapplicable to employment 'aboard a foreign vessel'); *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357 (holding that such

broad terms as 'every person' will be 'taken as a matter of course' to include only domestic and not foreign, 'persons'). Thus, by express provision of Section 2(3), with respect to their employment by foreign owners of foreign vessels, petitioners' members are not 'employees' within the meaning of the Act."

The only justification offered by respondent's counsel in oral argument for continuing to contend that when employed aboard foreign vessels petitioners' members are "employees" was that Section 2(2) of the Act does not *on its face* exclude foreign employers from its definition of "employer."

E. The Court Below Holds that in Exercising Jurisdiction to Issue Injunctions Under Section 10(l) the Court Need Not Determine Whether a Party Charged as a "Labor Organization" is, as a Matter of Law, a Labor Organization Within the Meaning of the Act, and that in This Case There Is "Reasonable Cause to Believe" that Both Petitioners Herein Are "Labor Organizations".

The court below held that the only function of a district court judge in a Section 10(l) case is "to aid the Board by preserving the status quo" until the Board can "ascertain by hearings" whether the Board has "statutory jurisdiction." In performing this function, it is "unnecessary for the trial judge to do more than test for reasonable cause" on the issue of statutory jurisdiction. "Reasonable cause" exists unless the petition manifests "a flagrant case of *ultra vires* action." The court of appeals simply reviews "discretion exercised below in a § 10(l) setting."

Applying this test, the court below stated:

> we find (both from the government brief and cases

> cited in support and respondents' counsel during oral arguments) [that petitioners herein] have, at least for International Organization of Masters, Mates and Pilots of America, Inc., AFL-CIO, conceded in other cases and pleadings that they are "labor organizations."

In its brief (p. 55) and reply brief (pp. 3-4), and in oral argument before the court below petitioners herein had pointed out that Local 47 was not in any way involved in any of the cases or "concessions" thus referred to, and respondent herein at no time contended that it was. Moreover, as to MMP, petitioners had noted that: (1) unlike this case, in the cases where reliance was placed on MMP's "concessions," evidence of those "concessions" was adduced in the trial court (Reply brief, p. 4); (2) the "concessions" referred to are nullities, having been simply stipulations to a bare legal conclusion, unsupported by factual allegations concerning the status as "employees" of the persons involved (Br. pp. 56-59); (3) in the *Wilson Transit* case, 80 NLRB 1476, 1477, where MMP had filed a petition with the Board seeking an election, and had predicated its claim to benefits under the Act on the premise that masters, mates and pilots were not supervisors, the Board, on the basis of the record, held that they were, and (4) as the district court found (App. 32), the other cases involved different categories of personnel with different duties, and any "concessions" made in such cases could have no relevance here, where only masters, mates and pilots are involved.

Without even mentioning the fact that persons employed by foreign shipowners aboard foreign vessels are not subject to the Act, or noting the impact of the law of pilots on the issue, the court below held that the "finding of reasonable cause is not clearly erroneous."

On October 13, 1958, petitioners filed in this Court an application for stay of the injunction pending filing of this petition for writ of certiorari. On October 16, 1958, respondent filed its opposition. The application was denied by Mr. Justice Clark on October 21, 1958.

REASONS FOR GRANTING THE WRIT.

This case poses basic questions concerning the scope and nature of the judicial function in cases arising under Section 10(l) which have not been but should now be settled by this Court.

A. The court below holds that a district court may issue an injunction against a party alleged in the petition to be a "labor organization" within the meaning of Section 10(l) without determining whether it is such, *i. e.*, whether, as a matter of law, its members are "employees" within the meaning of the Act. This holding necessarily overlooks the second proviso to Section 10(l). As it did for other statutory actions in Section 301(c), Congress in the second proviso to Section 10(l) made the jurisdiction of district courts in a Section 10(l) proceeding turn upon whether the "labor organization" (1) maintains its principal office in the district or (2) represents therein members who are "employees" within the meaning of the Act. This question, of course, is never reached or decided by the Board in the independent proceeding on the merits under Section 10(a)-(d), and is never considered by a court of appeals in reviewing a Board decision under Section 10(e) or (f). If the question is not decided by the courts in the Section 10(l) proceeding it is decided nowhere. And if it is left undecided the second proviso to Section 10(l) is effectively written out of the statute. To decide that question in this case, where neither petitioner was alleged or shown to maintain its principal office in the Northern District of Illinois, requires determination whether, as a matter of law, pilots employed by foreign shipowners on the Great Lakes are "employees" within the meaning of the Act. And, in this case, the preliminary jurisdictional question, whether either petitioner is a "labor organization" as defined in the Act, turns on the same determination.

In pretermitting consideration of this issue, upon which the jurisdiction of the district court to entertain the petition and grant the relief requested rests, the court below so far departed from the accepted and usual course of judicial proceedings as to require the exercise of this Court's power of supervision. Jurisdictional limitations are so vital that "if the record discloses that the lower court was without jurisdiction" appellate courts "will notice the defect, although the parties make no contention concerning it". *United States* v. *Corrick*, 298 U. S. 435, 440. A federal court must reject jurisdiction of its own motion whenever it appears "that its jurisdiction is not properly invoked". *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 184. The burden of proving jurisdiction must always be borne by the party asserting it (*ibid.*); jurisdiction may never be predicated on bare assertion of a legal conclusion (*ibid.* at 189); stipulations of legal conclusions affecting jurisdiction are "inoperative", a "nullity". *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281, 289; *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 114; *Sanford's Estate* v. *Comm'r of Internal Revenue*, 308 U. S. 39, 51. Jurisdiction "may be inquired into and questioned even by the litigant invoking it in the first instance, and despite the most solemn stipulations". *Arenas* v. *United States*, 95 F. Supp. 962, 972 (S. D. Calif.); *American Fire and Casualty* v. *Finn*, 341 U. S. 6, 17-18; 83 C. J. S. Sec. 10, p. 13.

B. If the status of petitioners' members as "employees" under the Act must be determined in the Section 10(l) proceeding, as it clearly must be to satisfy the jurisdictional limitations of Section 10(l) itself, the judgment below must be reversed. For the pilots upon whose status as "employees" when employed by foreign shipowners respondent predicated jurisdiction are, in that relationship, excluded from the definition by the plain language of Section 2(3), p. 4, *supra*. That Section 2(2) does not in terms exclude

foreign shipowners from the category of "employer" proves nothing; they are necessarily excluded by the rule of construction under which foreign employers on foreign territory are not reached by American regulatory legislation. *Foley Bros.* v. *Filardo*, 336 U. S. 281, 285-286, 292. A foreign vessel owned by a foreign shipowner "is deemed to be a part of the territory of that sovereignty [whose flag it flies], and not to lose that character when in navigable waters within the territorial limits of another sovereignty". *Lauritsen* v. *Larsen*, 345 U. S. 571, 585. Thus, foreign shipowners must be deemed to be persons who are not "employers" as defined in the Act, and pilots, when employed by them, therefore not "employees".[6]

But even if the foreign shipowners are "employers" the pilots may not properly be held to be "employees", for the status assigned them under the law of pilots—temporary master of the vessel—is that of "supervisor" as defined in Section 2(11), p. 9, *supra*. The holding of the district court, approved below, that on the affidavits alone the pilots are not supervisors although they are empowered to give orders to the master, mates and crew members which the latter must obey, and effectively to recommend the transfer of crew members from the position of helmsman, conflicts in its interpretation and application of Section 2(11) with

6. In opposition to our application for stay counsel for respondent herein attempted to renege on their concession in the court below that the Board would be "unable" to conduct an election because it lacks "jurisdiction" over the foreign vessels. They seem now to assert (Op. pp. 11-12-13) that the Board may have jurisdiction to treat the foreign shipowners as employers and their pilots as employees; that only a question of the Board's discretion to assert or decline jurisdiction would be involved. But, as this Court observed in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138, 142, the Board itself has heretofore given "no indication that it felt that the Taft-Hartley Act was intended to apply to a dispute involving employment aboard a foreign vessel". Whether the Act applies to a foreign shipowner and his employees turns on the intention of Congress, not on the Board's discretion. Cf. *Guss* v. *Utah Relations Board*, 353 U. S. 1.

Ohio Power Co. v. *NLRB*, 176 F. 2d 385 (CA 6), cert. denied, 338 U. S. 899, and *NLRB* v. *Leland Gifford Co.*, 200 F. 2d 620, 625 (CA 1).

C. The jurisdictional requirements of Section 10(1) itself aside, determination whether an entity charged as a "labor organization" is such is necessarily jurisdictional in a Section 10(1) proceeding. "Congress devised the statutory definitions for the express purpose of delimiting the scope of the Act". *Di Giorgio Fruit Corp.* v. *NLRB*, 191 F. 2d 642, 646 (CADC), cert. denied, 342 U. S. 869. Supervisors and other exempt categories were excluded from the Act's definition of "employee" for the very purpose of depriving the Board "of jurisdiction over them". H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess., p. 13; 1 Leg. Hist. L. M. R. A., pp. 302-306. And unions of supervisors and other groups excluded from the category of "employee" were eliminated from the definition of "labor organization" for the very purpose of removing such groups from both the benefits and the restrictions of the Act. *A. H. Bull Steamship Co.* v. *National Marine Engineers Beneficial Association*, 250 F. 2d 332, 338-339 (CA 2), cert. denied, 355 U. S. 932; *Di Giorgio Fruit Corp.* v. *NLRB*, *supra*, 191 F. 2d at 647. Proof of the labor organization allegation is thus "fundamental or 'jurisdictional' in the sense that it goes to a condition precedent to the operation of the statutory scheme"; it poses a question "indispensable to application of the statute." *Crowell* v. *Benson*, 285 U. S. 22, 54-55. Where Congress has made a particular status or condition "prerequisite to the operation of its statutory command," proof of that status or condition is "basic and essential . . ." *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 489. As this Court put it in *Stark* v. *Wickard*, 321 U. S. 288, 309-310:

> When Congress passes an Act empowering administrative agencies to carry on governmental activities,

> the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction.

The holding below that in a Section 10(l) proceeding federal courts must abdicate to the Board the function of determining initially, after hearing, whether the respondent is a "labor organization" ignores the fact that Congress expressly guaranteed to parties charged with violating Section 8(b)(4) a hearing and the right to counsel *in the Section 10(l) proceeding*. These rights are reduced to a meaningless chimera if, as the court below holds, the district court may determine only whether the Regional Director had "reasonable cause" to file the petition, and may not determine, on the basis of the evidence adduced in the Section 10(l) proceeding itself, whether the respondent is, as a matter of law, subject to the Board's jurisdiction and, if so, whether issuance of an injunction would be "just and proper". Statutory rights are not so susceptible of judicial evaporation.

The legislative history shows that Congress imposed the five day limit upon temporary restraining orders and guaranteed respondent parties the right to counsel and a hearing in order to "limit" the "discretionary power" of federal courts to issue injunctions in Section 10(l) cases. 93 Cong. Rec. 4840, 2 Leg. Hist., L. M. R. A., p. 1359. Drafted by Senator Morse (93 Cong. Rec. 4499, 2 Leg. Hist., L. M. R. A., p. 1109), these provisions were considered "adequate procedural safeguards" (93 Cong. Rec. 4840, 2 Leg. Hist., L. M. R. A., p. 1359) to assure

that authorization of interlocutory injunctive relief in secondary boycott cases would not reopen the door to "the flagrant abuses which brought about enactment of the Norris-LaGuardia Act". 93 Cong. Rec. 4839, 2 Leg. Hist., L. M. R. A., 1356. (See also, 93 Cong. Rec., 4130, 4133, 4283, 4759, 4768, 4835-4836, 4838, 4843-4844; 2 Leg. Hist., L. M. R. A., 1054, 1057-1058, 1149, 1326, 1342, 1350, 1356, 1364-1365.) Congress understood the historic fact that the temporary restraining order and the temporary injunction in labor disputes is too frequently used "as a strike breaking implement" (*Brotherhood of R. T. etc.* v. *Toledo, P. & W. R. R.*, 321 U. S. 50, 65); that "suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption, even if the injunction is later lifted". (Frankfurter & Greene, *The Labor Injunction*, The Macmillan Company, 1930, p. 201.)[7] 93 Cong. Rec. 4369, 4759, 2 Leg. Hist., L. M. R. A., pp. 1180, 1326.

The "most crucial" point of "legal maladjustment" against which the Norris-LaGuardia Act and the procedural protections imported from it into Section 10(l) were directed is that "temporary injunctive relief without notice, or, if upon notice, relying upon dubious affidavits, serves the important function of staying defendant's conduct regardless of the ultimate justification of such restraint. The preliminary proceedings, in other words, make the

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7. Reference to the cited work is appropriate, for the provision in Section 10(l) which limits to five days the duration of any temporary restraining order and declares it void after the expiration of that period was taken verbatim from Section 7 of the Norris-LaGuardia Act, 47 Stat. 71, 29 U. S. C. Sec. 107. (93 Cong. Rec. 4835, 4837; 2 Leg. Hist. L. M. R. A. pp. 1348, 1352). And the provision requiring district courts to give notice and a hearing to respondents was adapted from Section 7. The former provision stands in striking contrast to the restraining order provision of Rule 65(b) of the Federal Rules of Civil Procedure under which district courts in non-labor cases, without hearing defendant's witnesses, may grant ten day temporary restraining orders and extend them for an additional period of ten days.

issue of final relief a practical nullity". Frankfurter & Greene, *op. cit. supra*, p. 200. "Judicial error is too costly to either side of a labor dispute to permit perfunctory determination of the crucial issues; even in the first instance, it must be searching". *Ibid.*, at p. 201.

This requirement—searching examination of the crucial issues in a truly judicial proceeding—which Congress wrote into Section 10(l) because "opposition to restoring the injunctive process even in cases of secondary boycotts * * * [was] so strong" (93 Cong. Rec. 4843, 2 Leg. Hist., L. M. R. A., p. 1365), has been eliminated by the court below. Its decision sustains an injunction issued without even passing on questions of law on which jurisdiction over the defendants and over the subject matter of the action depends. If permitted to stand, the opinion below will unquestionably result in wholesale proliferation throughout the Seventh Circuit, and beyond, of improvident and unjustified Section 10(l) injunctions.[8]

The basic fallacy of the opinion below lies in its assumption that Congress reserved to the Board "exclusive" jurisdiction to pass upon questions of "statutory jurisdiction". The fact is that Congress "omitted the language giving the Board exclusive jurisdiction" precisely because it recognized that in light of the new "provisions authorizing temporary injunctions enjoining alleged unfair labor practices and [the] * * * provisions making unions suable", it was no longer accurate to describe the Board's power as

8. This prediction finds concrete support in the statement of highly placed Washington counsel for the N. L. R. B. in oral argument on October 7, 1958, in *Madden* v. *Local 28, International Organization of Masters, Mates and Pilots* (N. D. Ill.), 42 LRRM 2793. He construed the opinion of the Court of Appeals in the instant case as holding that there is "reasonable cause to believe" that Local 47 is a "labor organization" because Local 47 is affiliated with an international union, which, in wholly unrelated contexts, conceded that it, the international, was a "labor organization". If such a holding can stand there is indeed no statutory limit to the power of a district court to issue injunctions under Section 10(l).

"exclusive". H. Conf. Rep. No. 510 on H. R. 3020, p. 52, 1 Leg. Hist., L.M.R.A., p. 556. Congress was told by proponents of Section 10(l) that under it district courts would "determine the facts", and exercise "discretion" before granting an injunction. 93 Cong. Rec. 4836, 4840, 2 Leg. Hist., L.M.R.A., pp. 1351, 1352, 1359. Sections 10(l) and 303 were criticized on the ground that under them it was "possible for two different district courts and the NLRB to be dealing simultaneously with the same subject matter". 93 Cong. Rec. 4840, 2 Leg. Hist., L.M.R.A., 1358. Such "dispersion of authority" was said to be "bad legislative policy". (*Ibid.*) Section 10(l) was condemned in the President's veto message on the ground that it would take from the Board and vest in the courts "the power to decide complex questions of fact in a special field requiring expert knowledge". 93 Cong. Rec. 7488, 1 Leg. Hist., L.M.R.A., 920. No one in considering the bill ever suggested that district courts could or should abdicate to the Board power to adjudicate questions of law on which statutory jurisdiction turns. It is clear that Congress would have been outraged by such a suggestion. H. Conf. Rep. No. 510 on H. R. 3020, pp. 55-56, 1 Leg. Hist., L.M.R.A., 559-560; *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 479, 487.

Under the statutory scheme which Congress adopted, federal courts in actions under Sections 301 and 303 pass, for the purpose of granting preliminary as well as final relief, upon the very questions of "statutory jurisdiction" which are in issue in proceedings before the courts under Section 10(l) and before the Board under Section 10(b) and (c). In proceedings under Sections 301 and 303 the Board plays no role whatever. See, e. g., *A. H. Bull Steamship Co.* v. *National Marine Engineers Beneficial Association, AFL-CIO*, 250 F. 2d 332, cert. denied, 355 U. S. 932; *International L. & W. Union* v. *Juneau Spruce Corp.*, 342 U. S. 237; cf. *Benz* v. *Compania Naviera Hidalgo, S. A.*,

353 U. S. 138. Judicial performance in Section 10(l) cases of the "conventional judicial function" (*Universal Camera Corp.* v. *NLRB*, 340 U. S. at 490), of deciding legal questions on which jurisdiction turns would trench upon no prerogative which Congress vested only in the Board.

The only prerogative which Congress reserved to the Board exclusively is the power to determine whether *final* injunctive relief should be granted. That the Board must also determine questions of statutory jurisdiction in the proceeding before it is no reason to bar their judicial determination in the Section 10(l) proceeding. This Court has already held in *NLRB* v. *Denver Bldg. & Construction Trades Council*, 341 U. S. 675, 682-683, that the proceeding under Section 10(l) "is independent of that on the merits under Sec. 10(a)-(d)" and that "a decision on jurisdiction made in the independent preliminary proceeding for interlocutory relief under Sec. 10(l)" does not foreclose a regional officer from proceeding before the Board under Section 10(b) or impair the Board's jurisdiction to decide the same issues under Section 10(c) for the purpose of determining whether final relief should be granted. That the court in a Section 10(l) case and the Board in a complaint case might decide the jurisdictional issues differently, is, of course, no reason for precluding the court from independently determining jurisdiction in the proceeding before it. *International L. & W. Union* v. *Juneau Spruce Corp.*, 342 U. S. 237, 243-245; *NLRB* v. *Deena Artware, Inc.*, 198 F. 2d 645 (C. A. 6); *United Brick & Clay Workers* v. *Deena, Inc.*, 198 F. 2d 637, 642-645 (C. A. 6), cert. denied, 344 U. S. 897.[9]

The holding of the court below that initial determination

9. Because the 10(l) and 10(b) cases proceed independently and concurrently, the suggestion in respondent's opposition to our motion for stay, p. 9, that judicial consideration and determination would result in "delaying * * * ultimate Board decision" is simply not true.

of "statutory jurisdiction" over an entity alleged to be a "labor organization" is reserved to the Board and that on such an issue a district court need pass only on "reasonable cause" is in square conflict with *LeBaron* v. *Kern County Farm Labor Union*, 80 F. Supp. 151, 156-157 (S. D. Calif.); cf. *Sperry* v. *Denver Bldg. Trades Council*, 77 F. Supp. 321, 327 (D. Colo.). To construe Section 10(l) as requiring federal courts to issue temporary injunctions without determining jurisdictional issues would raise the most serious constitutional questions under Article III. Moreover, to require a defendant, on pain of contempt, to comply with statutory restrictions during the lengthy period which normally elapses between issuance of a district court injunction and Board decision under Section 10(c), without determining that defendant is even subject to those restrictions, would constitute a flagrant denial of due process. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 47-50, 51-52.[10] Such a denial cannot be brushed aside on the ground that a Section 10(l) injunction simply "preserves the status quo." "In labor cases, * * * [the preliminary] injunction cannot preserve the so-called status quo; the situation does not remain in equilibrium awaiting judgment upon full knowledge". Frankfurter and Greene, *The Labor Injunction*, The Macmillan Company, 1930, p. 201. It was precisely because Congress knew this that it precluded issuance of such injunctions except after full dress hearing and truly judicial consideration.

10. In their opposition to our application for stay, p. 8, counsel for respondent argue that it would be "artificial" for this purpose to distinguish between questions of jurisdiction and other questions, such as whether a violation was in fact committed. That distinction, basic in many aspects of the law, is vital here. For "reasonable cause" to believe that a covered respondent has violated the Act may well justify a court in lending the sanction of its decree to enforcement of obligations to which he has been subjected by Congress. But it cannot justify imposing upon a respondent by judicial decree obligations which Congress did not impose on him. That would be "government by injunction" with a vengeance.

Insofar as the decision below rests on the language of the second and third sentences of Section 10(l), the court confused the test which must guide an NLRB officer in determining whether to apply for injunctive relief with the standard which must be applied by a district court in determining whether injunctive relief should be granted. The regional officer must apply if, after preliminary investigation, he has "reasonable cause to believe" that a charge "is true and that a complaint should issue". But before exercising jurisdiction of any kind the district court must determine whether the jurisdictional prerequisites of Section 10(l) are satisfied. Before granting a temporary injunction the district court must accord the defendants a hearing, and it must determine, on the basis of that hearing, not on the basis of the regional officer's investigation, whether issuance of a temporary injunction is "just and proper". *Douds* v. *Wine & Liquor Distillery Workers Union*, 75 F. Supp. 447, 449, 450-452 (S. D. N. Y.). At minimum, application of the "just and proper" criterion requires determination that the party against whom a decree compelling compliance is sought is, as a matter of law, subject to the statute under which the claim of obligation is laid.

The approach of the court below is in square conflict with the approach of the Second Circuit in *Douds* v. *Local 50, etc.*, 224 F. 2d 49; with the decisions of numerous district courts and with the position taken by the Board itself in prior cases. In the *Douds* case, where the Board appealed from denial of injunctive relief by a district court, the court said (224 F. 2d, at 50):

> As the appellant concedes, a prerequisite to the granting of a preliminary injunction under 29 U. S. C. A. Sec. 160(l) is a finding by the district court that there is reasonable cause to believe that a violation of the Act, as charged, has been committed.

Applying this standard, the court of appeals affirmed the denial of injunctive relief on the ground that, as a matter of law, the organizational picketing therein complained of did not violate the Act. Accord, *e. g., Douds* v. *Metropolitan Federation of Architects, etc.*, 75 F. Supp. 672 (S. D. N. Y., per Rifkind, J.); *Alpert* v. *United Steelworkers of America, etc.*, 141 F. Supp. 447 (D. Mass., per Wyzanski, J.). If the approach of these cases is valid the decision below cannot stand, for there can be no cause to believe that a party has violated the Act until it is first determined that he is subject to its prohibitions.

Numerous district courts have held that the "just and proper" test imports traditional equity criteria pursuant to which a clear showing that the petitioner is entitled ultimately to prevail is prerequisite to the granting of a temporary injunction. *E. g., Alpert* v. *United Steelworkers of America, etc.*, 141 F. Supp. 447, 450, 453 (D. Mass.); *Douds* v. *Local 50, etc.*, 127 F. Supp. 534, 537 (S. D. N. Y.), aff'd, 224 F. 2d 49 (CA 2); *Douds* v. *Metropolitan Federation of Architects, etc.*, 75 F. Supp. 672 (S. D. N. Y.); cf. *A. H. Bull Steamship Co.* v. *National Marine Eng. B. Ass'n.*, 200 F. 2d 332, 337-338 (CA 2), cert. denied, 355 U. S. 932. As the district court put it in *Douds* v. *Local 50, etc.*, 127 F. Supp. 534, 537: "The issuance of a preliminary injunction is a drastic step which should not lightly be undertaken * * * in the absence of some clear proof" that the respondent has violated the Act. These holdings are irreconcilable with the view that a court in a Section 10(l) case may not concern itself with "which party, petitioner or respondent, is ultimately to prevail".

The opinion below assumes that Congress intended that a Section 10(l) injunction should issue in every case where a regional officer of the Board decides to issue a complaint, if only his decision to do so is not a "flagrant case of ultra vires action". But Section 10(l) was designed only

to supplement the administrative process by making effective relief available promptly against patent violations. Congress understood that the Board's procedure, which envisions trial before a Trial Examiner, issuance of an intermediate report, filing of briefs and exceptions with the Board, and study of the record and issues by the Board before issuance of its decision, is a time-consuming process occupying eighteen months or more from the filing of a charge to Board decision even in the simplest cases. To permit flagrant violations to go unchecked for so long a period would allow parties bent on violating the Act to accomplish their objectives by unlawful means before the Board could issue its decision.

Section 10(l) was not designed, however, to make the issue of final relief through the Board a nullity as far as unions are concerned by imposing death-dealing preliminary restraints in cases where the charging party's right to ultimate relief is uncertain, and even the Board's jurisdiction over the defendant is in doubt. That Congress required the Board's regional officer to apply for injunctive relief in every case where he concludes that a complaint should issue does not point the other way. It suggests only that Congress did not trust mere subordinate employees of an administrative agency to determine in which cases the violation is so clear as to warrant application for preliminary injunctive relief, and in which it is not. Having provided that all cases be brought to the district courts, Congress left it to the courts to determine in which cases relief should be granted.

D. Early clarification by this Court of the judicial function in Section 10(l) cases is of vast importance to unions, to employers, to the Board and to the courts. One hundred Section 10(l) cases were instituted by the Board in 1957 alone. NLRB, *Twenty Second Annual Report* (Govt. Print. Off., 1958), p. 178. Because the district

court's injunction expires when the Board issues its decision in the Section 10(b) case, and because issuance of the temporary injunction itself so frequently results in totally destroying the union's position in the underlying dispute, few opportunities for such clarification are presented. In the one case of which we are aware in which certiorari was sought from a decision of a court of appeals in a Section 10(l) controversy, issuance of the Board's decision rendered moot the question raised by the petition. *Los Angeles Building and Construction Trades Council* v. *Le Baron*, 342 U. S. 802. In the instant case, reestablishment of petitioners' right to picket foreign vessels at Great Lakes ports at the earliest possible moment is of continuing importance; the livelihood of petitioners' members depends upon it. Nor is there even a reasonable possibility that Board decision in the related but independent Section 10(b) case will render this case moot before this Court can pass upon the issues. Respondent herein has not even completed presentation of his case in chief before the Trial Examiner. The hearing is in recess and will not resume until October 28. We estimate that the Board's decision will not issue for more than fifteen (15) months from then, at the earliest.

E. The jurisdictional contentions of petitioners herein, which the court below termed "tenuous," turn on nothing more than application of statutory definitions to admitted facts. *Di Giorgio Fruit Corp.* v. *NLRB*, 191 F. 2d 642, 646-647 (CADC), cert. denied, 342 U. S. 869, among other cases, holds, and the Board has always conceded, indeed urged, that a local union composed of persons excluded from the statutory definition of "employee" is not a "labor organization" within the meaning of the Act, even though the international union with which it is affiliated is a statutory "labor organization".

With pilots employed by foreign ship owners aboard foreign vessels excluded[11] (see pp. 15-17, *supra*), petitioner Local 47 is admittedly composed exclusively of licensed masters, mates and pilots.[12] On this record, as respondent conceded, they are supervisors within the meaning of the Act.

The only defense now offered by counsel for respondent (Opp. to stay, pp. 11-13), is that the Board would not necessarily lack jurisdiction over the picketing in issue merely because it arose out of a dispute involving foreign vessels. We have never suggested the contrary. The Board lacks jurisdiction here because, since only non-"employees" are members of Local 47, Local 47 is not a "labor organization". Jurisdiction is wanting because, in this case, unlike *Moore Drydock*, 92 NLRB 547 and *Norris Grain Co.* v. *Seafarers' International Union*, 232 Minn. 91, 46 N. W. 2d 94, "the impact of the Board's order would necessarily [fall] on an organization exempt from its jurisdiction

11. Respondent herein attempted to argue below that even if pilots aboard foreign vessels are clearly supervisors, "on the payroll of a foreign ship, the 'apprentices' clearly would be employees", (Br. p. 38, Note 26). On the payroll of a foreign ship apprentices, like pilots, whether supervisors or not, are not "employees" within the meaning of the Act. Moreover, apprentices in supervisory positions are held by the Board to be "supervisors" within the meaning of the Act, *WTOP*, 115 NLRB 758, 759; *S. H. Kress Co.*, 94 NLRB No. 161, 28 LRRM 1160; *The Syracuse Stamping Co.*, 102 NLRB 230, 235, n. 5; *Phillips Chemical Co.*; 90 NLRB No. 76.

12. Despite this concession, respondent attempted, in argument in the court below, to draw from the second sentence of Section 1 of Article II of Local 47's constitution, which was attached as an exhibit to Johnson's affidavit (App. 15), an inference that unlicensed deck officers may be admissible to something less than "full" membership. But there is no evidence in the record to contradict the flat statement in Johnson's affidavit (*supra*, p. 4), and the first sentence of Section 1, that, in fact, only licensed masters, mates and pilots are admissible to and are members of Local 47. In any event, the Board holds that even unlicensed deck officers are "supervisors." *Colle Towing Co., Inc.* 85 NLRB 899, 900.

* * *". *W. T. Smith Lumber Co.* v. *NLRB*, 246 F. 2d 129, 131, note 7 (CA 5).

As to petitione. International MMP, this record contains no evidence that it admits to membership, or that any of its locals admit to membership, any persons who are "employees" within the meaning of the Act. There is, therefore, no more basis for asserting jurisdiction over MMP than over Local 47. But even if it could be assumed, *arguendo*, that some statutory "employees" are members of a local other than Local 47, so that, in some contexts, MMP might be held to be a "labor organization", the holding below which permits MMP therefore to be treated as a statutory "labor organization" in the context of this case is both in error and in square conflict with *A. H. Bull Steamship Co.* v. *National Marine Engineers Beneficial Association*, 250 F. 2d 332, 335, 336, 338 (CA 2), cert. denied, 335 U. S. 932. The court there held that to treat MMP as a "labor organization" within the meaning of the Act in any case it must be shown that the members involved in that particular case are "employees," not "supervisors," and that a mere showing that some employees who are not supervisors are members of or participate in the organization is not enough. The court explained (250 F. 2d at 336):

> Otherwise individuals excluded by the Act could join unions which represent some "employees" and gain the protections of the Act. Thus if MEBA [or MMP] were classified as a "labor organization" for purposes of this action simply because some of its members who are not within this bargaining unit are statutory "employees," then supervisors could gain the protections of the Act by joining either vertically integrated unions or unions which, in some parts of the country, represent nonsupervisory personnel. This result was not intended by Congress. H. R. No. 245, 80th Cong., 1st Sess., 15, S. Rep. No. 105, 80th Cong., 1st Sess., 3-4.

Particularly in the light of Section 501(3), it would be

"mischievous word playing" (*Universal Camera Corp. v. NLRB*, 340 U. S. 474, 487), to say that the term "labor organization" means one thing when used in Title I and something different when used in Title III. In any event, in the *Bull* case the court reached its conclusion on the basis of legislative history dealing with Congress' exclusion of "supervisors" from the National Labor Relations Act, not from Section 301. Moreover, *Bull*, too, was a ruling on temporary injunction; there can be no distinction between that and a ruling on temporary injunction under Section 10(l).

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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October 23, 1958.

APPENDIX A.

The relevant provisions of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. § 141, et seq., are as follows:

TITLE I.

Sec. 2. When used in this Act— * * *

(2) The term "employer" includes any person acting as an agent of an employer * * *.

(3) The term "employee" * * * shall not include * * * any individual employed as a supervisor * * * or by any other person who is not an employer as herein defined.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Sec. 8 (b). It shall be an unfair labor practice for a labor organization or its agents— * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike * * * where an object thereof is: (A) forcing or requiring any employer * * * to cease doing business with any other person.

Sec. 10 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise * * *.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint * * *.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice * * *.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States

for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive * * *.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party

will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit * * *.

TITLE III.

Sec. 301. * * *

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in which any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Sec. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike * * * where an object thereof is—(1) forcing or requiring any employer * * * to cease doing business with any other person; * * *.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Sec. 501. When used in this Act— • • •

(3) The terms "commerce," "labor disputes," "employer," "employee," "labor organization," "representative," "person," and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.

APPENDIX B.

UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

ROSS M. MADDEN, Regional Director of Thirteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS OF AMERICA, INC., AFL-CIO, ET AL.,

Respondents.

No. 58 C 773.

MEMORANDUM.

This is a petition by the National Lal or Relations Board under Section 10(l) of the National Labor Relations Act (Title 29 U. S. C. §160(l)). It is alleged that the respondents are labor organizations, that they are engaging in unfair labor practices as defined in Section 158(b), and that this course of conduct will result in great and irreparable damage. An injunction is requested restraining these practices until final disposition of the issues now pending before the Board.

Respondents International Organization of Master. Mates and Pilots of America, Inc., and the "Great Lakes District" of the same organization have filed a motion

to dismiss the petition. Their argument is that the persons here involved, pilots for foreign ships on the Great Lakes, are "supervisors" and therefore exempt from the act under Section 152(3) and (11) of Title 29, U. S. C.

The question of the status of pilots as "employees" or "supervisors" in this connection has been the subject of a good deal of confusion. (For example, see: *Douds* v. *Seafarers International*, 148 F. Supp. 953 (E. D. N. Y., 1957) and cases there discussed; *Matter of Wilson Transit*, 80 N. L. R. B. 1476; *Seafarer's International*, 40 L. R. M. 2180; *International Organization of Masters, Mates and Pilots*, 40 L. R. M. 2064.) In fact as the cases just cited demonstrate various pilots' organizations and the Board have at times asserted the opposite of their present arguments, the pilots claiming to be "labor organizations" and the Board maintaining that they are "supervisors". Further, in some of the cases, though the same organizations as here were involved, the employees were in different categories or had different duties.

Here, the crucial issue is the status of pilots of foreign ships on the Great Lakes. Affidavits have been filed in support of and in opposition to the motion which describe the duties of the pilots. The affidavits do not differ materially; for the purposes of this motion, the affidavits supplied by Respondents will be accepted. From the, (*sic*) it appears that after a pilot boards a ship he gives directions as to the course it is to steer. To accomplish this he sometimes gives commands directly to the helmsman; and if the helmsman is inefficient the pilot recommends to the captain that he be relieved and another seaman substituted. This advice is almost always instantly followed. The affidavits emphasize that the captains often have the pilots "take over" the ship. There is no doubt that they give orders and that these orders are obeyed.

The question is whether these duties qualify these pilots as "supervisors" as that term is defined in Section 2(11) of the Act (Title 29 U. S. C. § 152(11)): "any individual having authority, in the interest of the employer, to * * * discipline other employees, or responsibly to direct them, * * * or effectively to recommend such action if * * * such authority is not of a merely routine nature, but requires the use of independent judgment."

Although the duties of the pilots in some ways fit this definition, they are disqualified for another reason. The statutory concept of a "supervisor" is of one who "in the interest of the employer" directs a group of "other employees" with whom he is in a continuing relationship. Supervisory authority must be consistent, not sporadic and irregular (*Pep Boys, Manny, Moe & Jack, Inc.*, 114 NLRB 1195 (1955); *Helms Motor Express, Inc.*, 107 NLRB 132 (1952); *N. L. R. B.* v. *Leland-Gifford Co.*, 200 F. 2d 620, 625 (1st Cir. 1954)). Thus engineers employed on a particular ship are "supervisors" (*A. H. Bull Steamship Co.* v. *Nat'l Marine Eng. Ass'n*, 250 F. 2d 332, 336 (2nd Cir., 1957)), but their situation is very different from that of a pilot. One cannot in any real sense of the word "supervise" others with whom one has such slight and occasional contact as the pilots have with, for example, the helmsman to whom they may on occasion give orders.

Further, the primary function of a "supervisor" is to give effective direction to those in his charge. On the other hand, the primary function of a pilot is to direct the movements of a ship; such orders as he gives are only incidental to accomplishing that objective (*Reeves & Sons*, 114 NLRB 1243 (1955); *Baltimore Transit Co.*, 92 NLRB 1260 (1951); *U. S. Gypsum Co.*, 116 NLRB (No. 85) (1956)).

The pilots are employed by the foreign shipowners to give necessary technical advice and assistance. They act

aboard ship in this capacity, not as "supervisors" within the meaning of the Act.

For all of these reasons, for the purposes of this application there is reasonable cause to believe that the Respondents are labor organizations within the Act (*Douds v. Seafarer's International Union*, 148 F. Supp. 953 (E. D. N. Y., 1957)).

The motion to dismiss will be denied, and Respondents are directed to answer within 5 days.

PHILIP L. SULLIVAN, *Judge*.

June 10, 1958.

APPENDIX C.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 12361. September Term and Session, 1958.

ROSS M. MADDEN, Regional Director, etc.,
Petitioner-Appellee,
vs.
INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS OF AMERICA, INC., ET AL.,
Respondents-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

September 26, 1958.

Before FINNEGAN, SCHNACKENBERG and PARKINSON, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Section 10(l) of the Labor Management Relations Act,[1] 1947, as amended, provides in part relevant here: "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases. • • • If, after such investigation the officer or regional attorney to whom the matter may be referred has *reasonable cause* to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States • • • within any district where the unfair labor practice in question has occurred • • • or wherein such person resides or

1. 61 Stat. 136, 29 U. S. C. § 141.

transacts business for appropriate injunctive relief *pending the final adjudication of the Board with respect to such matter.* Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law. * * *" (Italics supplied). Ross M. Madden, local Regional Director, N. L. R. B., invoked § 10(l), petitioned for, and was granted a temporary injunction, in the court below, running against respondents, International Organization of Masters, Mates, and Pilots of America, Inc., AFL-CIO and International Organization of Masters, Mates and Pilots—Great Lakes District Local No. 47, pending final disposition of the matters before the National Labor Relations Board in Cases No. 13-CC-168, 169 and 170 concerning them. These respondents by their motions to dismiss Madden's petition claimed they were not "labor organizations" under § 2(5) and § 8(b)(4) of the Act. Rejecting this theory, the district judge found there was reasonable cause to believe respondents were labor organizations within the Act, citing *Douds* v. *Seafarer's International Union*, 148 Fed. Supp. 953 (D. C. N. Y. 1957). Respondents had also contended that their people, pilots for foreign ships on the Great Lakes, were members of the class of persons excluded from the range of the Act by § 2(3) and § 2(11), 29 U. S. C. § 152(3) and (11), because they were "supervisors". This complementary position, geared to respondent's motion, was similarly resolved against them by the trial judge who found that "The pilots are employed by the foreign shipowners to give necessary technical advice and assistance. They act aboard ship in this capacity, not as 'supervisors' within the meaning of the Act". After the court below denied the motions to dismiss, respondents elected to stand upon their motions, reserved their rights to appeal from

such denial, and entered into a stipulation containing the following, *inter alia*:

> "* * * and respondents objecting to the entry of said temporary injunction solely on the grounds set forth in their aforesaid motions, subject to the approval of the Court, the aforesaid motions to dismiss and the affidavits filed in support and in opposition thereto shall be treated as having been filed and made in opposition to and in support of petitioner's motion for temporary injunction, and the Court's ruling on said motions to dismiss shall be deemed to be and shall constitute its ruling on petitioner's motion for temporary injunction and respondents' opposition thereto. Subject to respondents' contention that this ruling is in error, and reserving fully respondents' right to appeal, petitioner's motion for temporary injunction may be granted."

In this appeal by respondents from the order below granting an interlocutory injunction, they could not have cast their nets more widely, for they misconstrue the functions of the district judge when he is passing upon a petition for temporary relief under § 10(l). By its express terms that provision is aimed at an injunction *pendente lite i.e.*, pending the final adjudication of the Board based upon its hearings; subsequently judicial review at the Court of Appeals level comes into play. Congress has expressly authorized district courts to grant temporary injunctive relief pending administrative decision. Clearly a district judge proceeding under § 10(l), as here, looks to the statutory yardstick of "reasonable cause" required as the basis for the petition and he is certainly not deciding which party petitioner or respondent, is ultimately to prevail, nor do we now. In this incipient stage the district court was asked to aid the Board by preserving the status quo until it could ascertain by hearings, whether it had statutory jurisdiction, and if unfair labor practices existed. We, on the other hand

are simply reviewing discretion exercised below in a § 10(l) setting. *Douds* v. *Milk Drivers & Dairy Employees Union*, 248 F. 2d 534, 537 (2nd Cir. 1957). The finding of reasonable cause is not clearly erroneous under Rule 52, Federal Rules Civil Procedure, 28 U. S. C., and respondents by their motions admitted all facts well pleaded in Madden's petition.

This brings us to the tenuous jurisdictional argument put forward by the respondents, who, we find (both from the government brief and cases cited in support and respondents' counsel during oral arguments) have at least for International Organization of Masters, Mates and Pilots of America, Inc., AFL-CIO, conceded in other cases and pleadings that they are "labor organizations". No more is required during interlocutory stages than that the district judge ascertain if there is reasonable cause for believing these respondents are "labor organizations" under the Act. Here we have a crux in the deliberately maintained position of respondents, but it is unsound and unavailing for the record supports the order brought here for review. It is unnecessary for the trial judge to do more than test for reasonable cause. Obviously if the petition manifested a flagrant case of *ultra vires* action "reasonable cause" would be absent.

The order granting temporary injunction entered in the District Court on June 17, 1958 and brought here for review is affirmed.

AFFIRMED.